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No. 859

IN THE

Supreme Court of the United States

October Term, 1941

315-805

FRANK D. KLIMKIEWICZ,
Petitioner,

vs.

THE WESTMINSTER DEPOSIT AND TRUST COMPANY, A CORPORATION, AND MICHAEL WALSH, Trustees under the will of M. FRANCIS YINGLING,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank D. Klimkiewicz, respectfully shows and represents unto Your Honors that:

Statement of Matter Involved.

In June 1938, respondents filed in the District Court of the United States for the District of Columbia a bill against petitioner to have respondents declared to be the owners by adverse possession of a certain strip of land (R. 1), the record title to which had been acquired by petitioner (R. 9). Petitioner denied the adverse possession claimed, and sought, instead, counter-relief because of trespasses by respondents short of the *fifteen year* period for adverse possession prescribed by Section 341 of Title 24, D. C. Code of 1929 (R. 5).

The action was tried by a District Court Justice, without a jury. The evidence was *undisputed* that, since November 1926, respondents' decedent Yingling, through tenants, had made use of the strip of land in question for the wrecking of automobiles (R. 13-14). Since such period totalled less than *twelve years*, when the statute required *fifteen years* for adverse possession, it manifestly showed merely the trespasses claimed by petitioner, and not the adverse possession claimed by respondents. The only other evidence was the testimony of one Margery Catherine Miller (R. 14-15). Respondents produced her as their witness. She testified that, before her birth in 1869, her father had acquired adjoining land known as Lots 1 and 2, Square 1001, which he caused to be surveyed by the District Surveyor, Mr. Forsythe, and to be fenced in according to the survey; that her father died in 1896, after which she became the owner of said Lots 1 and 2, and deeded them to respondents' predecessor, a Mr. Donnelly; and that "When I executed the deed to Mr. Donnelly in November 1926, I didn't know it covered land other than Lots 1 and 2." (R. 15.) The *other land* which she did not

know was being covered by such deed was the strip herein concerned, located immediately to the north of said Lots 1 and 2, and known as the South 22 feet of original Lot 20 in Square 1001.

Notwithstanding this state of the record, the District Court Justice entered judgment in favor of respondents, and against petitioner (R. 11), with an announced finding that respondents' decedent, and predecessors in title, had held adverse possession of the South 22 feet of original Lot 20 in Square 1001 "for more than *twenty years*" (R. 10).

Petitioner exercised his *right* of appeal under Section 26 of Title 18, D. C. Code of 1929, to the United States Court of Appeals for the District of Columbia (R. 12). In the District Court Justice's "Statement of Proceedings Upon Trial," it was expressly admitted that (a) the parties had stipulated to the location of a mill wall on the north line of the strip in dispute (R. 15), and (b) the trial Justice was "*without recollection* whether or not" witness Margery Catherine Miller had testified to an intervening space between such mill wall and the north line of the fence built by her father (R. 16). The trial Justice thereby necessarily admitted being *without recollection* whether that witness had testified *for or against* the adverse possession claimed by respondents. Since the strip in dispute was only 22 feet wide (from north to south), an intervening space of 22 feet between the mill wall and the north fence built by Mrs. Miller's father would necessarily mean that no part of the strip in dispute had been fenced in by her father, and that he had merely fenced in Lots 1 and 2 in accordance with the official survey, *as she had herself distinctly testified.*

Notwithstanding this condition of the record, the United States Court of Appeals for the District of

Columbia, by its final action of October 10, 1941, affirmed the judgment of the District Court (R. 24-5), with an announced finding, from "The testimony of Mrs. Miller and other witnesses," of adverse possession "from before 1869 until at least 1936" (R. 20).

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 10, 1941. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. An absolute right of appeal from the District Court to the Court below having been given to petitioner by statute, was either the District Court or the Court below empowered to *nullify* such right by upholding a final judgment against petitioner when the District Court was, *admittedly,* without recollection—and the Court below was necessarily under similar handicap — concerning evidence vitally affecting the warrantability or unwarrantability of the judgment?

2. May a right of appeal be, in effect, lost or destroyed due to a *failure of recollection* by the trial Justice?

3. May any Court, either of first instance or appellate, *conjecture away* legal title to land?

Reasons Relied Upon for the Allowance of Writ.

1. The questions presented, as aforesaid, are of great importance to the public generally, because no system of jurisprudence can be worthy of the name which permits the rights of litigants to be nullified in any of the ways indicated in such questions.

2. An earlier group of Justices of the Court below had recognized the fundamental rule that a right of appeal cannot be lost by failure of recollection of the trial Justice, and, consequently, that the judgment must be set aside and a new trial directed in such eventuality. (*Evans* v. *Humphreys*, 9 App. D. C. 392, 393-4.)

3. An earlier group of Justices of the Court below had also expressly recognized that nothing "conjectural" can be permitted to defeat the legal title to land. (*Reid* v. *Anderson*, 13 App. D. C. 30, 37.)

4. The present Justices of the United States Court of Appeals for the District of Columbia appear to need the aid of this Honorable Court in restoring that tribunal to fundamentals heretofore recognized.

WHEREFORE, your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia in this cause, entitled in said tribunal *Frank D. Klimkiewicz* v. *The Westminster Deposit and Trust Company, a corporation, and Michael Walsh, Trustees under the Will of M. Francis Yingling, No. 7803,* that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside; and for

such further relief and remedy in the premises as this Court may deem meet and proper.

FRANK D. KLIMKIEWICZ, *Petitioner*,

By counsel:

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